UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL-SUITES HOTEL AND CASINO

and **Case No. 28-CA-060841**

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

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BRIEF OF *AMICUS CURIAE* THE NEVADA RESORT ASSOCIATION

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I. QUESTIONS PRESENTED.

1. Should the Board overrule *Purple Communications*?

2. If the Board overrules *Purple Communications*, what standard should it adopt, or should it return to the holding of *Register Guard*?

3. If the Board returns to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than the employer's email system?

4. Should the Board apply the same standard for other types of electronic communications when made by employees using employer-owned equipment?

II. STATEMENT OF INTEREST.

Established in 1965, the Nevada Resort Association ("NRA") serves as the primary advocacy voice of the gaming and resort industry in Nevada. Notably, the gaming and resort industry is Nevada's most vital sector, supporting more jobs, paying more wages and salaries, and generating more economic output than any other sector of the state's economy. The gaming and resort industry is also Nevada's largest taxpayer, generating over a billion dollars annually for state and local governments, schools, and other public service providers.

As the representative of the state's largest industry, the NRA is uniquely situated to provide information, perspective, and industry insight for federal and state decision makers on the impact of their government and regulatory activities.

The NRA submits this brief to assist the National Labor Relations Board ("the Board") in its implementation of an appropriate standard that will allow employers to enforce discipline and ensure productivity in the workplace, maintain compliance with other legal requirements, and preserve the right to dictate the proper use of employer property in the workplace.

III. SUMMARY OF THE ARGUMENT.

In response to the Board's Notice and Invitation to File Briefs, the NRA submits this amicus brief and urges the Board to overrule *Purple Communications*, 361 NLRB 1050 (2014). Modern technologies, including e-mail systems, have in no small way revolutionized the workplace and facilitated workplace communications. While these advances undoubtedly create significant efficiencies in the workplace, technology without proper restraint undermines overall productivity. This principle is especially true where the improper use of an employer's e-mail system undermines the longstanding principle that "working time is for work."

Contrary to the suggestion that e-mail is akin to the "watercooler" where interactions take place face-to-face in a physical location and in real time, e-mails may be created, sent, forwarded, reviewed, and analyzed at any time throughout the day. Oftentimes, a recipient of an email must review the contents of the email *before* knowing whether it is related to work. Due to the nature of e-mail, *Purple*

Communications' purported limitation on allowing personal use of an employer's e-mail system during non-working time is really an unrealistic presupposition that employees can act accordingly and that employers will be able to monitor and enforce the same.

Additionally, the *Purple Communications* standard diminishes the ability of employers to comply with other state and federal laws—a significant issue for the highly-regulated gaming employers in Nevada. The Board may not "wholly ignore other and equally important Congressional objectives," which it risks doing if *Purple Communications* remains the applicable standard. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). It is one thing to allow an employee to engage in the brash verbal conduct often prevalent in labor-management relations and often protected by the National Labor Relations Act. *See, e.g.*, *Cooper Tires and Rubber Co.*, 363 N.L.R.B. No. 194 (May 17, 2016), *aff'd* 866 F.3d 885 (8th Cir. 2017) (holding that Section 7 protected the statements of "Go back to Africa, you bunch of [expletive] losers," and "Hey, anybody smell that? I smell fried chicken and watermelon."). It is quite another thing to require employers to host and facilitate such conduct on employer-owned technology, especially where the conduct undermines the ability of employers to comply with federal and state statutory prohibitions against harassment and discrimination.

Finally, *Purple Communications* places an unnecessary burden on employers

to use their own property as they see fit. Workplace e-mail systems and related technologies embody an extraordinary investment of time and resources by employers. The standard set forth in *Purple Communications* improperly invades upon the dominion of employers over their property. Indeed, *Purple Communications* essentially compels employers to allow use of their property—including the transmission and storage of data—in ways that are inimical to the employer's mission and objectives and without any corresponding compensation. Such an invasion of property rights is wholly unnecessary where modern technology (including personal cellular telephones and text messaging), social media applications, and traditional in-person communications provide ample opportunity for employees and unions to communicate and engage with each other without burdening employer property rights. Accordingly, the Board must abandon *Purple Communications* in recognition that modern technology provides ample other avenues for employee communications without the need to impose unnecessary burdens on employers in the use of their own property.

IV. ARGUMENT.

A. Purple Communications Undermines The Principle That "Working Time Is For Work."

By assuming that employees will limit their personal communications during working time, *Purple Communications* ignores the realities of electronic

communications and the real disruptions modern technology can have on productivity if left unchecked. Anecdotal evidence abounds in everyday life demonstrating that we, as a society, have not quite learned to limit our use of technology to the proper time and place. For example, even with multiple warnings to silence/turn-off cellular telephones, moviegoers must still endure the buzzing and bright-screen distractions of other patrons' incoming text messages and status updates. Couples, presumably out to enjoy a romantic evening together, are often observed with telephones in hand and seemingly more interest in Pinterest[1] or the latest sports score than each other. With technology all around us and our own natures urging us to check the latest update, find the current score, and read any incoming text or e-mail regardless of content and regardless of our surroundings, is it any wonder that employers seek to impose limits on how such technology is used in the workplace?

While proponents of *Purple Communications* may argue that the current standard allows employers to forbid use of their e-mail systems for personal communications during working time, such arguments epitomize the adage that "it is easier said than done." The nature of e-mail makes it almost impossible to enforce working time restrictions. For example, e-mails may be created, sent,

[1]Pinterest is a social media platform that acts much like an internet bulletin board where users "pin" various images of personal interest and organize them into collections. It also serves a social media network where users can view and comment on pins and send each other private messages.

forwarded, reviewed, and analyzed at any time throughout the day. E-mails may be sent to a single recipient or to an unlimited number of employees with the push of a button. Oftentimes, a recipient of an email must review the contents of the email *before* knowing whether it is related to work. Such a review in and of itself distracts employees from performing their work, to say nothing of the likely response crafted and e-mailed back while on work time. In that regard, *Purple Communications*' purported limitation on allowing personal use of an employer's e-mail system only during non-working time is both unrealistic and unworkable.

Every day, employers face the difficult task of ensuring that employees use working time for work. A casual internet search reveals multiple surveys and studies of just how much working time is actually wasted by employees engaged in non-work tasks on social media, personal telephone calls, text messages, and e-mails. For example, a 2014 survey by Salary.com and published by *SFGATE* revealed that 89% of its respondents admitted to wasting time at work—31% waste approximately thirty minutes daily, 31% waste approximately one hour daily, 16% waste approximately two hours daily, 6% waste approximately three hours daily, 2% waste approximately four hours daily, and 2% waste five or more hours daily. Aaron Gouevia, *2014 Wasting Time at Work Survey*, SFGATE.com (Mar. 18, 2014), available at www.sfgate.com/jobs/salary/article/2014-Wasting-Time-at-Work-Survey-5347458.php. Given the substantial and already present threat that

improper use of e-mail poses on overall productivity, why should employers be required to further enable such conduct by allowing employees to engage in non-business-related communications on employer-owned systems and equipment?

B. Purple Communications Diminishes An Employer's Ability To Comply With Other Laws.

The Nevada gaming industry, like many other industries, is highly regulated and subject to an overwhelming number of federal and state statutes and regulations. Federal agencies such as the U.S. Department of Labor, U.S. Equal Employment Opportunity Commission, and National Labor Relations Board, as well as state agencies such as the Nevada Labor Commissioner and the Nevada Equal Rights Commission, enforce numerous federal and state statutes governing the workplace. Among those statutes are Title VII of the Civil Rights Act of 1964 and Nevada Revised Statute 613.330, which prohibit discrimination and harassment in the workplace based on personal characteristics such as race, color, gender, national origin, religion, and sexual orientation. Other statutes such as the Age Discrimination in Employment Act of 1967 and the American With Disabilities Act of 1990, along with corresponding state laws, provide similar protections for individuals over the age of forty and individuals with disabilities. Despite those laws and their accompanying regulations, the Board has recognized that in labor-management relations some extra leeway may be necessary in the exercise of employee rights to "...engage in...concerted activities for the purpose

of collective bargaining or other mutual aid and protection." 29 U.S.C. § 157; *see, e.g.*, *Cooper Tires and Rubber Co.*, 363 N.L.R.B. No. 194, *aff'd* 866 F.3d 885 (holding that Section 7 protected the statements of "Go back to Africa, you bunch of [expletive] losers," and "Hey, anybody smell that? I smell fried chicken and watermelon.").

Striking the balance between the legal requirements for employers to maintain workplaces free from harassment and discrimination under federal and state statutes and the leeway given to employees in the exercise of their Section 7 rights is difficult enough. Mandating that an employer must now allow employees to engage in conduct on its e-mail system protected by Section 7, but violative of other federal and state statutes, is absurd. If nothing else, such a mandate forces employers to appear unable to remedy conduct that may be violative of federal and state anti-discrimination and anti-harassment laws. At worst, such a mandate makes employers appear complicit in the discriminatory or harassing conduct of the perpetrating employee. Employers should not have to face such a legal conundrum, especially where employees have ample other means of communication that do not involve employer-owned equipment and systems.

The risks facing Nevada employers in the gaming industry by the standard set forth in *Purple Communications* is particularly significant. As the Board may be aware, Nevada gaming industry employers exist and are able to operate through

privileged licenses strictly regulated by the Nevada Gaming Control Board and Gaming Commission. Violations of Nevada Gaming Commission and Nevada Control Board Regulations may result in the suspension or termination of the privileged gaming license and, in turn, affect the employment of hundreds, if not thousands, of employees.

Recently, the Nevada Gaming Control Board has sought to address issues of sexual harassment in the workplace and is in the process of considering amendments to the Nevada Gaming Commission and Nevada Control Board Regulations that address the prevention and reporting of sexual harassment claims. *See* Gaming Control Board Notice #2018-66, *2018-03R: Notice and Agenda of Public Regulation Workshop of the Nevada Gaming Control Board to Solicit Comments for Possible Amendments to Nevada Commission Regulation 5 Regarding, Without Limitation, Sexual Harassment Prevention and Workplace Response and Related Sexual Harassment Awareness and Prevention Minimum Internal Control Standards*, (Sept. 27, 2018). Unfortunately, once again, as the leeway given to employees in the exercise of their Section 7 rights and the need for employers to maintain workplaces free from harassment and discrimination do not always coincide, Nevada gaming employers should not be forced to place their privileged licenses in jeopardy due to the statutory and regulatory conflicts resulting from the *Purple Communications* standard.

C. Purple Communications Constitutes An Unnecessary Infringement On Employer Property Rights.

Infringing on someone's property rights for the sake of convenience hardly comports the rule of law and the ideal protection of recognized rights. Do we walk through another's private property merely because it will save us time? Do we take office supplies from the workplace for personal use because it is more convenient than buying our own? Do we set aside the due process rights of individuals for the convenience of a swift execution? Convenience should never be the guardian of rights. Nevertheless, convenience is exactly the not-so-subtle justification in *Purple Communications*. Indeed, on a basic level, *Purple Communications* can be viewed as the subordination of employer property rights merely because technology has created a more convenient way for employees to communicate with each other. In reality, employees have ample opportunities in and out of the workplace to engage in face-to-face communications and other dialogue without resorting to use of employer e-mail systems. If special circumstances truly exist such that employee-to-employee communications cannot take place, the burden should be on the employees to demonstrate the same and not vice versa as is required by *Purple Communications.*

When there is a conflict between protected employee activity and employer property rights, the Board is required to accommodate those two principles "'with as little destruction of one as is consistent with the maintenance of the other.'"

Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Unfortunately, *Purple Communications* failed to give proper deference to the U.S. Supreme Court's guidance in that regard and, instead, chose to discount the undeniable fact that employees are much more connected today by other means than ever before and do not need employer-owned e-mail systems to engage in protected, concerted activity. For example, employees have access to free, personal e-mail accounts (*e.g.*, Gmail and Yahoo), social media platforms (*e.g.*, Twitter, Snapchat, Facebook, Instagram, and LinkedIn), message boards, blogs, and group chats (*e.g.*, Slack, GroupMe, Google Hangouts, WhatsApp, Reddit, and Tumblr). By using personal e-mail and other applications, employees can create personalized groups and discussions—all without commandeering employer equipment and systems. Given the advances in and availability of smartphones and other personal mobile devices, such connectivity negates the need for any destruction of employer property rights by requiring employers to facilitate non-business-related employee communications on their network and e-mail systems.

Furthermore, attempting to analogize e-mail as some sort of digital watercooler is not fitting. The "watercooler" is still the "watercooler." Watercooler discussions allow for contemporaneous, face-to-face discussions where participants can gauge reactions, interject their thoughts in real time, and

immediately respond to others in a physical location. On the other hand, watercooler discussions do not entail the preparation and storage of messages on employer-owned equipment that can be viewed at any time and in any physical location.

If anything, e-mail is more akin to what the Board has historically considered as distribution, which entails the preparation and delivery of a written message or other content, the ability to review that content at any point in time, and the risk that such materials may clutter the workplace if not lawfully and appropriately regulated. While employers may lawfully prohibit the distribution of materials in work areas, *Purple Communications* mandates that such materials must now be transmitted and stored on employer-owned systems and networks—thus cluttering the digital work area. Such infringements on employer property rights should be not be countenanced. It is, after all, the employers' property.

In addition to the numerous means and methods for employees to connect, many unions are already quite prolific in using modern technology to communicate directly with employees. A prime example of this fact is the massive digital and social media presence of one of Nevada's largest unions—the approximately 57,000-member Culinary Workers Union Local 226 ("Culinary Union"). In addition to its internet webpage, the Culinary Union maintains social media accounts on Facebook, Twitter, Instagram, YouTube, Pinterest, and Tumblr.

Individuals can "connect" with the Culinary Union through these applications or receive text and e-mail alerts directly from the Culinary Union simply by providing their contact information. *See* Culinary Workers Union Local 226 Website, www.culinaryunion226.org/. Other unions have similar digital and social media presences and provide similar opportunities for employees to connect. *See, e.g.*, The International Union of Painters and Allied Trades Website[2], iupat.org/; Teamsters Local 14 Union Website, www.teamsters14.com/; Teamsters Local 631 Union Website, http://www.teamsterslocal631.org/; Southwest Regional Council of Carpenters Website, www.swcarpenters.org/local1977/. Accordingly, to argue that employees need to use employer-owned e-mail systems to engage in protected, concerted activity ignores the true realities of modern communications and employee connectivity. The Board must take the appropriate steps to preserve employer property rights over all their equipment.

D. *The Alternative* Register Guard *Standard.*

The Board must abandon *Purple Communications* in its entirety and find that there is no statutory or other obligation requiring employers to allow employees to use employer-owned e-mail systems and equipment for purposes of engaging in protected, concerted activity. However, if the Board does not wish to apply a wholesale ban on employee use of employer e-mail systems, the Board

[2]The International Union of Painters and Allied Trades, District Council 15, Local 159, AFL-CIO is a party to the pending matter before the Board.

should, at a minimum, return to the more sensible standards set forth in *Register Guard*, 351 N.L.R.B. 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), and allow employers to set the initial directive as to how their equipment will be used in the workplace, *i.e.*, for business purposes.

Register Guard gave employers the initial control over how their property could be used. Specifically, under *Register Guard*, employers lawfully imposed neutral restrictions on employees' non-work-related use of their e-mail systems—*i.e.*, use of the employer's e-mail system is for business purposes only—even though such restrictions would limit the use of the e-mail systems for protected concerted or union activities. If an employer chose to open the use of its e-mail systems to personal solicitations, then the employer had to enforce such policies in a non-discriminatory fashion. In that regard, the *Register Guard* standard remained consistent with other longstanding Board precedent. Accordingly, if the Board chooses not to protect employers in their proper right to dictate how their own property is used, at a minimum, the Board must return to the *Register Guard* standard and allow employers to make at least the initial determination of how their own equipment will be used in the workplace.

V. CONCLUSION.

For the foregoing reasons, the Nevada Resort Association urges the Board to overrule *Purple Communications*.

DATED this 5th day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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